Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93-31

In the Matter of	)	
	)	
Amendment of Parts 1, 2 and	)	
21 of the Commission's Rules	)	PR Docket No. 92-80
Governing Use of the Frequencies	)	
in the 2.1 and 2.5 GHz Bands	)	

REPORT AND ORDER

Adopted: January 14, 1993 Released: February 12, 1993

By the Commission:

I. INTRODUCTION

1. On April 9, 1992, we adopted the Notice of Proposed Rule Making that commenced this proceeding, soliciting public comment on a variety of proposals aimed at reducing the delays associated with the processing of applications for stations in the Multipoint Distribution Service (MDS).[1] In this Report and Order, we take final action adopting several of the proposals advanced in the Notice. Specifically, by our action today we are amending our rules in a manner designed to streamline the MDS regulatory scheme and curtail the filing of speculative MDS applications. The rule changes adopted in this item will serve the public interest by improving the conditions for competition in the multichannel video distribution marketplace in accordance with our goals and the Congressional directives recently set forth in the Cable Television Consumer Protection and Competition Act of 1992.[2]

II. BACKGROUND

2. The instant proceeding is the latest in a series of rule makings initiated by this agency to inspire more vigorous competition and greater diversity of consumer choices in the multichannel video delivery marketplace. In other actions designed to facilitate these objectives, we recently adopted rule changes permitting local telephone companies to participate in the video distribution market through the provision of video dialtone services and

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[1] Notice of Proposed Rule Making, PR Docket No. 92-80, 7 FCC Rcd 3266 (1992) [hereinafter Notice]. As in the Notice, throughout this proceeding "MDS" will be used to refer collectively to the single channel (MDS) and multichannel (MMDS) authorizations unless otherwise indicated. We take final action in this proceeding amending our rules to reflect this practice.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).

limited ownership of video programming,[3] and modified our rules to remove the ban on network ownership of cable television systems.[4] In addition, over the course of the past five years, we have conducted a number of proceedings with the goal of removing regulatory obstacles to the growth of "wireless cable"[5] as a viable contender in the multichannel video distribution arena.[6] The regulatory changes adopted in this item are an extension of our efforts in this latter category.

3. Despite various efforts to structure our rules and policies in a manner likely to foster the effective delivery of wireless cable service, the wireless cable industry has not yet fully realized its competitive potential. As indicated in the Notice, this is due to some extent to the fact that approximately 20,000 MDS applications, some dating back as far as the 1983 filing period, have been pending before the Commission for several years.[7]

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[3] Second Report and Order, CC Docket No. 87-266, 7 FCC Rcd 5069, 5070 (1992) (public interest objectives of the video dialtone proceeding include promoting additional competition and diversity of services in the video and general communications markets).

[4] Report and Order, MM Docket No. 82-434, 7 FCC Rcd 6156, 6163 (1992) (rationale for allowing networks to own cable systems includes the expectation of enhanced competition and greater diversity of programming available to viewers).

[5] "Wireless cable" is a multichannel video distribution medium that resembles cable television, but that uses microwave channels rather than coaxial cable or wire to transmit programming to subscribers. Report and Order, CC Docket No. 86-179, 2 FCC Rcd 4251, 4252 (1987). The term "wireless cable" as used in this context does not imply that the service constitutes cable television for any statutory or regulatory purpose. See Report and Order, MM Docket No. 89-35, 5 FCC Rcd 7638, 7639-41 (1990) (the definition of a cable system does not include transmissions such as MDS), vacated on other grounds sub nom. Beach Communications, Inc. v. FCC, 965 F.2d 1103 (D.C. Cir. 1992).

[6] See, e.g., Report and Order, CC Docket No. 86-179, 2 FCC Rcd 4251 (1987) (adopting rule changes permitting licensees to use MDS frequencies on either a common carrier or non-common carrier basis and holding program origination rules inapplicable to MDS operations); Report and Order, MM Docket No. 89-35, 5 FCC Rcd at 7639-41 (issuing ruling that wireless cable systems should not be subject to franchise requirements); Report and Order, Gen Docket Nos. 90-54, 80-113, 5 FCC Rcd 6410 (1990) (adopting rule changes increasing the availability of MDS channels for use in wireless cable systems by eliminating MDS ownership restrictions and simplifying certain rules governing the application process); Second Report and Order, Gen. Docket No. 90-54, 6 FCC Rcd 6792 (1991) (reallocating the three OFS H-channels to the MDS). See also Order on Reconsideration, Gen. Docket Nos. 90-54, 80-113, 6 FCC Rcd 6764 (1991).

[7] Notice, 7 FCC Rcd at 3267. See also Notice of Inquiry, MM Docket No. 89-600, 5 FCC Rcd 362, 367-68 (1989).

Due in part to this large and aging backlog, wireless cable operators have had difficulty amassing the number of channels necessary to meet subscriber demand and match competitors' offerings.[8] In the meantime, delays in the processing of MDS applications and other obstacles to the expansion of wireless cable systems, such as unfair or discriminatory practices in the sale of video programming,[9] have allowed traditional cable television systems to strengthen their position in the multichannel video distribution marketplace, making it more difficult for rival providers to come forth as meaningful competitors.[10]

4. We initiated PR Docket No. 92-80 with the principal objective of promoting the expansion of wireless cable by expediting the processing of MDS applications. Specifically, in the Notice we proposed, inter alia, to (1) relocate some or all aspects of the processing of MDS applications and the regulation of the MDS to either the Private Radio Bureau or the Mass Media Bureau;[11] (2) streamline the rules and technical standards used to govern the MDS by (i) replacing the interference protection criteria contained in 47 C.F.R. § 21.902 with fixed co- and adjacent-channel distance separation standards;[12] and (ii) amending the requirements currently contained in 47 C.F.R. §§ 21.15(a) and 21.900, pursuant to which an MDS applicant must demonstrate that it is legally, financially, technically, and otherwise qualified to render service, that there are frequencies available to enable the applicant to render satisfactory service, and that the applicant has an available station site, to instead require a certification that these things are true;[13] (3) deter the filing of speculative applications by (i) adopting rule changes disallowing settlement agreements among MDS applicants; (ii) expanding the one-to-a-market rule to prohibit MDS applicants from holding any

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[8] Typically, wireless cable operators use some combination of thirteen MDS channels available to them on a full-time basis (Channels 1 and 2A, or in some cases Channel 2, Channels E1-E4, F1-F4, and H1-H3), and twenty channels in the Instructional Fixed Television Service (ITFS) (Channels A1-A4, B1-B4, C1-C4, D1-D4, and G1-G4) available to them on a leased, part-time basis, to transmit video entertainment programming to subscribers. See Notice, 7 FCC Rcd at 3266, n. 8.

[9] Notice of Proposed Rule Making, Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, 8 FCC Rcd 210 (1992) (On Dec. 10, 1992 FCC proposed rules pursuant to the Cable Act of 1992 regarding access to programming.). See Notice of Proposed Rule Making and Notice of Inquiry, Gen. Docket Nos. 90-54, 80-113, 5 FCC Rcd 971, 980 n. 10 (1990).

[10] Notice, 7 FCC Rcd at 3267.

[11] Id. The Notice also solicited comment as to whether MDS processing and regulation should remain in the Common Carrier Bureau.

[12] Id. at 3268-69.

[13] Id. at 3270.

interest in more than one application for the same channel or channels at sites within the same area;[14] and (iii) strengthening the rules that prohibit the assignment or transfer of conditional MDS licenses prior to completion of construction, and amending 47 C.F.R. § 21.29 to prohibit substantial changes in ownership of pending MDS applications;[15] and (4) utilize a new MDS lottery procedure.[16] In addition, to stop the prodigious influx of MDS applications and to permit us to develop an up-to-date comprehensive database, we imposed a short-term, temporary freeze on the filing of applications for new stations in the MDS.[17]

III. DISCUSSION

A. Relocation of MDS processing, interference protection criteria, processing procedures.

5. Since the adoption of the Notice, we have made significant headway toward reducing the backlog of pending MDS applications. To a large degree, we credit the imposition of the freeze and the hiring of additional staff to work on MDS applications and related pleadings with this progress. We now believe that the advances we have made in the direction of eliminating the backlog, coupled with the development of a comprehensive consolidated database and the rule changes adopted herein streamlining the MDS regulatory process and deterring the filing of speculative applications, render certain of the more extreme proposals set forth in the Notice superfluous. Specifically, this includes (1) the proposal to relocate the processing and/or regulation of the MDS to another bureau within the Commission, (2) the proposal to replace the existing interference protection criteria with fixed distance separation standards, and (3) the proposal to adopt a new lottery procedure. Accordingly,

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[14] Id.

[15] Id. at 3270 n. 33.

[16] Id. at 3271-72.

[17] The freeze on the filing of applications for new MDS stations was effective immediately upon adoption of the Notice. See Notice, 7 FCC Rcd at 3270. See also Public Notice, PR Docket No. 92-80 (Private Radio Bureau April 15, 1992) (delineating the terms of the freeze). The freeze does not apply to MDS/MMDS modification, assignment, transfer of control, extension, or signal booster applications. The specific frequencies affected by the freeze include those identified in 47 C.F.R. § 21.901 and the ITFS frequencies available to MDS entities pursuant to 47 C.F.R. § 74.990. We anticipate that the freeze will remain in place at least through the end of the third quarter of 1993, but we will re-evaluate the status of the remaining backlog in July, 1993 to determine whether that estimate should be revised.

we have decided not to proceed with these proposals.[18]

B. Rule Changes.

6. Modification of 47 C.F.R. §§ 21.15(a) and 21.900. In their present form, 47 C.F.R. §§ 21.15(a) and 21.900 require an MDS applicant to demonstrate (1) that it is legally, financially, technically, and otherwise qualified to render the proposed service; (2) that there are frequencies available to enable it to render satisfactory service; and (3) that it has a station site available. As mentioned, in the Notice we proposed to replace the showing currently required of MDS applicants under these rules with a certification requirement. The commenters that addressed this proposal are essentially evenly split. Generally, those commenters that support the proposal contend that the adoption of a certification requirement, particularly if coupled with the use of a simplified MDS application form, would help expedite processing and ease the burden on applicants.[19] Commenters that oppose the certification proposal generally do so out of concern that the use of certifications in lieu of the detailed showing currently mandated under Sections 21.15(a) and 21.900 may invite speculation by making it easier for insincere entities to prepare and file "cookie cutter" applications.[20]

7. Because of our strong interest in deterring the filing of speculative MDS applications,[21] we have been especially cautious in analyzing the comments filed in response to the proposed certification procedure. After careful consideration, we are confident that the rule changes adopted in this proceeding disallowing settlement groups, prohibiting applicants from holding

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[18] The comments filed in response to these proposals do not favor a contrary result, even in the environment that existed at the time the Notice was adopted. For example, the commenters were essentially evenly split on the proposal to relocate the processing and/or regulation of the MDS to another bureau. Although the question of where within the Commission the processing and regulation of the MDS should be performed is purely an internal agency matter and, as such, need not have been presented for public comment, see 5 U.S.C. § 553(b)(A), the commenters' views were nevertheless informative. In addition, the commenters almost unanimously opposed the proposal to replace the interference protection criteria set forth in 47 C.F.R. § 21.902 with preset co- and adjacent-channel distance separation standards. Few commenters discussed the proposed lottery procedure.

[19] See, e.g., Comments of WCA at 72; Comments of Fletcher, Heald & Hildreth at 25. We are planning to modify the MDS application form to make it responsive to the rule changes adopted in this proceeding and to eliminate any irrelevant terms.

[20] See, e.g., Comments of Champion Industries, Inc. at 10; Comments of BF Investments at 10; Comments of Spectrum Analysis & Frequency Engineering, Inc. (SAFE) at 16; Comments of the Consortium of Concerned Wireless Cable Operators at 19.

[21] See Notice, 7 FCC Rcd at 3267 & n. 14.

any interest in more than one application for the same channel or channels at sites within the same area, and restricting the transfer of MDS applications and conditional licenses will amply counteract any encouragement of speculative filings that might otherwise have resulted from the conversion to certifications for site availability.[22] Moreover, we continue to believe as stated in the Notice, that the use of certifications in lieu of the detailed showing required under Section 21.15(a) in its present form will help expedite processing by reducing the number of components of each MDS application that must be reviewed extensively by Commission staff.[23] Indeed, in our view, the small risk of increased speculation presented by the conversion to certifications of site availability in the circumstances at hand is far outweighed by the increased efficiency that will result from the use of certifications.[24] Accordingly, we take final action adopting our proposal to modify 47 C.F.R. § 21.15(a) to provide that MDS applicants may certify rather than demonstrate station site availability.[25]

8. We are not, however, adopting our proposal to convert 47 C.F.R. § 21.900 into a general certification requirement from the existing requirement of demonstrating one's legal and technical qualifications. Upon further contemplation, we are not convinced that the conversion to a certification for these components of the application will significantly expedite processing. In addition, we are concerned that utilization of certifications for these types of qualifications may invite speculation. Consequently, we are retaining Section 21.900 in its present form.

9. Finally on this issue, we wish to make clear our intention to respond to the submission of a false certification under 47 C.F.R. § 21.15(a) by employing all available remedies, including the dismissal with prejudice of all applications filed by the offending applicant or the revocation of authorizations. In addition, if evidence of intent exists, we will refer such cases to the Department of Justice for criminal prosecution under 18 U.S.C. § 1001. Furthermore, we will treat the submission of an intentionally falsified certification as a reflection on an applicant's basic qualifications to become

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[22] See infra paras. 10-14.

[23] Notice, 7 FCC Rcd at 3270.

[24] We wish to make clear, however, that an applicant assumes the risk that a site may not be available to complete construction in a timely manner during the initial construction period. Applicants are reminded that requests for an extension of time to construct for lack of site availability are not granted. 47 C.F.R. § 21.40(b).

[25] In response to a suggestion advanced by the Federal Communications Bar Association, see Comments of FCBA at 10, we are also amending Section 21.15(a) to eliminate the requirement that an MDS applicant whose access to or use of its station site is somehow limited or conditioned by a lease or other agreement to use land must file a copy of the lease or agreement with its application. In lieu of this requirement, applicants must certify compliance with any such agreement.

or to remain a licensee.

10. Rule Changes Designed to Reduce Speculation. We are also adopting the proposals set forth in the Notice that seek to deter the filing of speculative MDS applications. First, we adopt our proposal to disallow partial and full settlement agreements among MDS applicants, and to apply this prohibition to both pending and future applications.[26] Almost unanimously, owners and operators of wireless cable systems that filed comments in this proceeding endorse this proposal.[27] Some commenters contend, however, that applying the ban to pending applications will accomplish little by way of deterring speculation because the applications in question have already been filed.[28] In addition, certain commenters challenge our legal authority to apply the ban on settlement agreements to pending applications.[29] Finally, other commenters disagree with our underlying assumption that settlement agreements encourage speculation.[30]

11. After reviewing the record, we remain certain that the adoption of our proposal to disallow settlement groups will deter the filing of speculative applications and, consequently, promote the public interest objectives of this proceeding. As discussed in the Notice, prior to the imposition of the freeze on further filings, applications for new MDS stations

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[26] See Notice, 7 FCC Rcd at 3270.

[27] See, e.g., Comments of Baypoint TV, Inc. at 10; Comments of Fletcher, Heald & Hildreth at 23; Comments of Champion Industries, Inc. at 11-12; Comments of BF Investments, Inc. at 11-12; Comments of Mutli-Micro, Inc. at 11-12; Comments of Choice TV of Michiana, Inc. at 11-12; Comments of Wireless Cable, Inc. at 11-12; Comments of Cardiff Broadcasting Group at 11-12; Comments of WUB TV Melbourne Ltd Partnership, et al. at 12; Comments of Hardin & Associates at 7; Comments of Marshall Communications, Inc. at 8; Comments of Phase One Communications, Inc. at 10-11; Comments of Kingswood Associates at 13. The Wireless Cable Association International, Inc. supports the settlement ban as applied to future applications. WCA believes, however, that settlements should be permitted among pending applicants because in its view, it is unlikely that many applicants will withdraw. Reply Comments of WCA at 12.

[28] See Comments of American Telecommunications Development, Inc. at 2-6; Comments of Coalition for Wireless Cable at 10-11; Comments of International Communications Group, Inc. at 6-8; Comments of Simon A. Hershon and Mary D. Drysdale, Tenants by the Entirety at 5; Reply Comments of WCA at 10.

[29] See, e.g., Comments of International Communications Group, Inc. at 8; Comments of Coalition for Wireless Cable at 11. In addition, over 550 identical form letters were filed in this proceeding challenging our legal authority to prohibit settlement agreements among pending applicants.

[30] Comments of USIMTA at 13; Comments of SBA at 21.

were being submitted at the rate of approximately 1000 per month.[31] The number of MDS authorizations that have been cancelled or forfeited for failure to construct is one of several indicia that many of these applications may be speculative.[32] Frequently, applicants participate in settlement groups to increase their chances of winning the lottery and diffuse the risk of losing their investment. Many of these applicants do not intend to construct an MDS station and instead wish to have their application granted solely for the purpose of later selling their authorization to wireless cable operators in need of spectrum. By disallowing settlement agreements, we will deter such abuse of MDS lotteries, thereby reducing the number of speculative applications filed. This in turn will facilitate the proper utilization of spectrum and conserve the Commission's resources.

12. As mentioned above, there is some disagreement among the commenters as to whether we should apply the prohibition on settlement agreements to pending applications. We believe that the benefits of applying the ban prospectively to pending filings will be numerous. While we recognize that this will not in and of itself deter speculation, it will nevertheless be beneficial in helping to ensure that speculative applicants are not rewarded. Nor are we persuaded by the argument that we lack legal authority to apply the settlement ban to applications pending as of the effective date of our new rules. It is well-settled that the rules applicable to previously-filed applications may be amended.[33] See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (D.C. Cir. 1989). Accordingly, we amend 47 C.F.R. §§ 21.33(b) and 21.901(f)(1) to delete the portions of these rules that allow the formation of settlement agreements among MDS applicants.[34]

13. We also adopt our proposal to prohibit MDS applicants from holding any interest, including a corporate interest of less than one percent, in more than one application for the same channel or channels at sites in the same

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[31] Notice, 7 FCC Rcd at 3267 & n. 14.

[32] See Notice, 7 FCC Rcd at 3270 n. 32. To date, over 600 MDS authorizations have been cancelled or forfeited for failure to construct.

[33] Our existing rules permit the formation of settlement groups only after an application has been placed on public notice designating it for lottery and prior to a prescribed ten-day deadline before the lottery. Except for MMDS applications filed in 1983 which have been placed on public notice designating the applications for lotteries on February 26, 1993, and are exempt from the settlement ban, see note 34 infra, no applications in this status are currently on file.

[34] The only exception to the settlement ban as applied to pending applications will be in the case of those applicants whose applications have already been placed on a Lottery Notice, and who have formed settlement groups pursuant to 47 C.F.R. § 21.33(b) after the issuance of the relevant Lottery Notice, but prior to April 1, 1993, the effective date of this change.

geographic area, and to apply this new rule to pending applications.[35] As discussed in the foregoing paragraph, this rule change operates hand-in-hand with our rule changes eliminating settlement agreements. Therefore, we take final action amending 47 C.F.R. § 21.901(d)(2) to provide that no applicant for a station in the MDS may file more than one application per station per channel or channel group within one geographic area[36] and that the stockholders, partners, owners, trustees, beneficiaries, officers, directors, or any other person or entity holding any interest in one application for a particular channel or channel group in a particular area must not have any interest, directly or indirectly, in another application for the same channel or channel group within the same geographic area. Applicants with pending applications that violate the provisions of this new rule may, in the 14 day period following the effective date of the rule changes adopted in this proceeding, amend their applications to divest themselves of any interests held in other applications. All applicants are advised to take advantage of this opportunity to amend: as proposed in the Notice, we will not grant an authorization to any entity, including tentative selectees, with any interest whatsoever in another application or applications for the same channel or channel group in the same geographic area.[37]

14. Finally, we have also decided to adopt our proposals to amend 47 C.F.R. §§ 21.29 and 21.39 to further restrict the circumstances in which we will permit the transfer of an interest in MDS applications and conditional licenses prior to the completion of construction.[38] Specifically, we are amending Sections 21.39(a) and 21.29 to provide that the sale, transfer, assignment or other alienation of any interest in an MDS application or conditional license will be prohibited prior to the completion of construction except (1) in cases involving involuntary transfers such as the licensee's bankruptcy, death or legal disability; and (2) in cases involving pro forma transfers of ownership or control of the authorized facilities. The adoption of these rule changes will supplement the ban on the formation of settlement agreements by prohibiting common settlement transactions that include options to buy. In addition, the amendment of Sections 21.29 and 21.39 will eliminate the administrative burden and processing delays associated with amendments and modifications seeking changes in the ownership of pending MDS applications and MDS conditional licenses.

15. Some commenters express concern that the amendment of Sections 21.39(a) and 21.29 could have a negative impact on the development of the

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[35] Only three commenters addressed this proposal, and all three support it. See Comments of WCA at 30-31; Comments of WUB TV at 9; Comments of WCCI at 3.

[36] In other words, no applicant may hold an interest in two or more mutually exclusive MDS applications.

[37] Notice, 7 FCC Rcd at 3271.

[38] Id. at 3275-76.

wireless cable industry by preventing legitimate business transactions.[39] We are convinced, however, that the exceptions to the prohibition in the case of involuntary and pro forma transfers will afford wireless cable operators the necessary flexibility to engage in legitimate business transfers.[40] In addition, a wireless cable operator seeking to participate in the transfer of a pending MDS application or conditional license in circumstances other than those permitted by the rules remains free to petition the Commission for a waiver of the general prohibition on such transactions.

C. Additional Rule Changes to Expedite Processing of Future Applications.

16. At this time, we address several other proposals advanced either in the Notice or in the comments as suggested means for expediting the processing of future MDS filings. First, in the Notice we proposed to discontinue

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[39] See Comments of the Consortium of Concerned Wireless Cable Operators at 21; Comments of WCA at 44-45; Comments of SBA at 20-21.

[40] As proposed in the Notice, we are also adding 47 C.F.R. § 21.29(f) and amending 47 C.F.R. §§ 21.23 and 21.31 to prohibit the filing of amendments seeking more than a pro forma change in ownership or control. We are not adopting various other suggestions advanced by the commenters as methods to deter speculative MDS filings. Specifically, we decline to adopt WCA's suggestions that we revise the structure of MDS filing fees, and that we modify the definition of a protected service area, see Comments of WCA at 34, 36-39. Although WCA's suggestion concerning the fee structure could prove beneficial, Congressional authority is required for us to restructure fees in this manner. We considered and declined to adopt several requests that we expand an MDS station's protected service area in the Order on Reconsideration in Gen. Docket Nos. 90-54, 80-113, 6 FCC Rcd at 6765-66. We will not revisit this issue in this proceeding, but will revisit it with regard to a reconsideration petition in that proceeding. Champion Industries, Inc. and other commenters suggest that we prohibit educational and other ITFS entities from entering into lease agreements with any parties other than wireless cable operators. See Comments of Champion Industries, Inc. at 18. We are, however, constrained from considering Champion's suggestion because it is outside the scope of this proceeding, which is limited to the MDS processing scheme. Various other suggestions advanced by the Wireless Cable Connection, Inc. and Fletcher, Heald & Hildreth need not be discussed in detail because these suggestions are rendered redundant or unnecessary by other rule changes adopted in this proceeding. Finally, we reject on the merits USIMTA's suggestions that we replace the cut-off rule of Section 21.914 with a sixty-day cut-off rule, and that we restrict eligibility for MDS licensing to applicants who have not forfeited a previous MDS license. See Comments of USIMTA at 12-14. As discussed in the Report and Order in Gen. Docket Nos. 90-54, 80-113, 5 FCC Rcd at 6424, significant public interest benefits adhere in the cut-off rule of Section 21.914. USIMTA's suggested eligibility restriction would have a potentially detrimental impact on the wireless cable industry and would serve no useful purpose in view of the fact that more effective rule changes are being adopted in this proceeding.

licensing low power signal boosters operated by licensees.[41] Most commenters support this proposal, and we have decided to adopt it.[42] In an effort to reduce the burden on Commission staff and on MDS applicants, we adopted rule changes in the Order on Reconsideration in Gen. Docket Nos. 90-54, 80-113, allowing pre-authorization construction and operation of low power signal boosters by MDS, MMDS and ITFS licensees in certain prescribed circumstances.[43] These rule changes have served to expedite processing without resulting, to our knowledge, in increased interference. Because of this success, we believe that further gains can be realized by discontinuing the licensing of low power signal boosters that under the current rules may be installed without prior authorization. Accordingly, we take final action herein modifying 47 C.F.R. §§ 21.913(g) and 74.985(g) to provide that MDS and ITFS licensees need not submit an application to install a low power signal booster. Licensees seeking to install a low power signal booster must, however, submit certification demonstrating compliance with the various components of Sections 21.913(g) and 74.985(g). This certification must be submitted within 48 hours of installation of the booster station.[44]

17. In addition, we agree with Hardin & Associates that future processing can be expedited by requiring MDS applicants to submit, upon initial filing of the MDS application, two maps.[45] One map must show the boundaries of the protected service areas of each authorized or previously-proposed co-channel station with a transmitter site within 100 miles of the applicant's proposed transmitter site, and the 45 dB desired signal to undesired signal contour line of the applicant's proposed MDS station for co-channel stations. A second map must show the boundaries of the protected service areas of each authorized or previously-proposed adjacent-channel station with a transmitter site within 100 miles of the applicant's proposed transmitter site, and the 0 dB desired signal to undesired signal contour line of the applicant's proposed MDS station for

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[41] Notice, 7 FCC Rcd at 3268 n. 20.

[42] See, e.g., Comments of WCA at 73-73; Comments of The Consortium of Concerned Wireless Cable Operators at 24-27.

[43] Order on Reconsideration, Gen. Docket Nos. 90-54, 80-113, 6 FCC Rcd at 6767-68. The conditions for pre-authorization construction and operation of signal boosters are set forth in 47 C.F.R. §§ 21.913(g) and 74.985(g).

[44] By adopting this certification requirement, we have attempted to balance the interests of various ITFS and MDS entities that submitted comments in this proceeding. See Comments of the Consortium of Concerned Wireless Cable Operators at 25; Joint Comments of the Arizona Board of Regents, et al. at 10; Comments of the Roman Catholic Communications Corporation of the Bay Area at 6, 7.

[45] See Comments of Hardin & Associates at 6.

adjacent-channel stations.[46] The submission of these two maps of protected service areas, as this term is defined in 47 C.F.R. § 21.902(d), will quickly highlight possible areas of interference or confirm the lack of the same, thereby further reducing the burden on Commission staff.[47] Accordingly, we are amending 47 C.F.R. § 21.902 to add the requirement that MDS applications filed after the lifting of the freeze must include the prescribed protected service area maps.[48]

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[46] See 47 C.F.R. § 21.902(f); see also 47 C.F.R. §§ 21.902(c)(1), 21.902(c)(2). See also generally Amendment of Parts 21, 74, and 94 of the Commission's Rules and Regulations with regard to the technical requirements applicable to the Multipoint Distribution Service, the Instructional Television Fixed Service and the Private Operational-Fixed Microwave Service (OFS), 98 FCC 2d 68 (1984).

[47] The 100-mile figure is based on a suggestion advanced by the Wireless Cable Association. See Comments of WCA at 71.

[48] We have given careful consideration to various other suggestions advanced by the commenters as means to expedite future processing, which we decline to adopt. Specifically, we refrain from adopting the suggestion advanced by Spectrum Analysis & Frequency Engineering Corp. (SAFE) that before filing, MDS applicants be required to obtain concurrence from previously granted system owners within 112 km. See Comments of SAFE at 6. Such a requirement would serve little purpose while imposing an additional burden on applicants and Commission staff. Although several commenters suggest that we modify the rules governing minimum ITFS programming requirements to allow licensees of multichannel ITFS systems to satisfy their cumulative requirements using one channel rather than each channel (see Comments of Champion Industries, Inc. at 16-17; Comments of Cardiff Broadcasting Group at 16-17; Reply Comments of WCA at 30-32) this proposal is outside the scope of the instant proceeding. We similarly decline to adopt SAFE's suggestion that in the future, we consider and process all 31 channels in a given market as one block. See Comments of SAFE at 4; Reply Comments of SAFE at 4-5. While we agree that such a procedure would permit the assembling of a maximum number of channels, numerous concerns, such as the treatment of ITFS channels, are implicated in a change of this nature. The record in this proceeding does not provide an adequate foundation for the resolution of these issues. Finally, we refuse to adopt several suggestions advanced by Champion Industries, Inc., Cardiff Broadcasting Group, Wireless Cable, Inc., Choice TV of Michiana, Inc., Multi-Micro, Inc., and BF Investments, Inc., to be applied to backlogged applications. These suggestions include the following: (1) that we expedite review of requests for reinstatement of channel groups that have been previously dismissed and that reinstatement be granted to all applicants who perfected their applications within 30 days of dismissal; (2) that MDS completion of construction deadlines be made common for all construction authorizations in a given market consistent with the last-granted construction authorization; and (3) that commercial ITFS applications filed in January and February of 1992 be immediately placed on public notice. The last of these suggestions is moot; the ITFS applications have been included in the consolidated data base and will be in the public release thereof. The other

IV. CONCLUSION

18. In summary, we have adopted numerous changes in this proceeding to streamline the processing of applications for stations in the MDS. These rule changes are designed to eliminate various impediments to the development of wireless cable service. In turn, the emergence of wireless cable as a viable alternative to traditional cable offerings will serve the public interest by contributing to a more diversified and competitive video distribution marketplace.[49]

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

19. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

The adoption of this Report and Order will promote the public interest by furthering the Commission's goal of facilitating the development of a video distribution marketplace characterized by competition and a variety of consumer choices.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

The Chief Counsel for Advocacy of the United States Small Business Administration (SBA) filed comments in response to the Initial Regulatory Flexibility Analysis. In these comments, the SBA stated that certain rule changes proposed in the Notice, particularly the pre-set separation standards, could disadvantage some small businesses by making it more difficult to secure financing.

III. Significant alternatives considered:

Several alternatives were discussed in the Notice. In addition, a number of alternative suggestions were raised in the comments. All significant alternatives have been addressed. Those proposals deemed problematic by the Small Business Administration are not being adopted.

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two suggestions are outside the scope of this proceeding. Moreover, however, it is undesirable on the merits for us to relax our construction deadlines. On the whole, these deadlines serve as an effective means of ensuring the proper utilization of spectrum and prompt delivery of service.

[49] At this juncture, we note that if, in view of the numerous rule changes adopted in this proceeding, any applicant whose application is currently pending withdraws prior to the issuance of the public notice designating its application for random selection, its application filing fees will be refunded. We interpret 47 C.F.R. § 1.1111(a)(4) to permit the refund of application fees paid by such entities.

VI. ORDERING CLAUSES

20. Accordingly, pursuant to the authority of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 C.F.R. §§ 154(i) and 303(r), IT IS ORDERED that 47 C.F.R. Parts 2, 21 and 74 of the Commissions's Rules ARE AMENDED as set forth in the Appendix below, effective June 1, 1993, except for the ban on settlements which is effective April 1, 1993.

21. IT IS FURTHER ORDERED that applicants for stations in the MDS whose applications are currently pending before this Commission and who wish to amend their applications to bring them into conformance with the rule changes adopted in this proceeding may do so during the fourteen-day period beginning June 2, 1993 and ending June 15, 1993.

22. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Report and Order to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1981).

23. IT IS FURTHER ORDERED that PR Docket No. 92-80 IS TERMINATED.

24. For further information concerning this proceeding, contact Robert James, Common Carrier Bureau, (202) 634-1706.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Parts 2, 21 and 74 are amended as follows:

PART 2 -- FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for 47 C.F.R. Part 2 continues to read as follows:

AUTHORITY: Secs. 4, 302, 303, 307, 48 Stat., as amended, 1066, 1082; 47 U.S.C. §§ 154, 302, 303, 307, unless otherwise noted.

2. 47 C.F.R. § 2.106 is amended by removing note NG47 from column 5 in frequency band 2500-2655 MHz, and by adding "AUXILIARY BROADCASTING (74)" and "DOMESTIC PUBLIC FIXED RADIO (21)" under column 6 in frequency band 2500-2655 MHz, and by revising note NG47 to read as follows:

§ 2.106 Table of frequency allocations.

* * * * *

NG47 In Alaska, frequencies between the band 2655-2690 MHz are not available for assignment to terrestrial stations.

* * * * *

PART 21 -- DOMESTIC PUBLIC FIXED RADIO SERVICES

3. The authority citation for 47 C.F.R. Part 21 continues to read as follows:

AUTHORITY: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602, 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. Secs. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552.

4. 47 C.F.R. § 21.15 is amended by revising paragraph (a) to read as follows:

§ 21.15 Technical content of applications.

* * * * *

(a)(1) Except in the case of applicants for Multipoint Distribution Service stations, applicants proposing a new station location (including receive-only stations and passive repeaters) must indicate whether the station site is owned. If it is not owned, its availability for the proposed radio station site must be demonstrated. Under ordinary circumstances, this requirement will be considered satisfied if the site is under lease or under written option to buy or lease.

(2) Where any lease or agreement to use land limits or conditions in any way the applicant's access or use of the site to provide public service, a copy of the lease or agreement (which clearly indicates the limitations or conditions) must be filed with the application, except in the case of applicants for stations in the Multipoint Distribution Service. Multipoint Distribution Service applicants must instead certify compliance with the limitations and conditions contained in the lease or option agreement.

(3) Multipoint Distribution Service applicants proposing a new station location must certify the proposed station site will be available to the applicant for timely construction of the facilities during the initial construction period.

(4) An applicant's failure to include a certification required under this Section will result in dismissal of the application. The submission of a false certification will subject the applicant to all remedies available to the Commission, including the dismissal with prejudice of all applications filed by the offending applicant and the revocation of authorizations of the offending applicant. Also, if evidence of intent exists, the case will be referred to the Department of Justice for criminal prosecution under 18 U.S.C. § 1001. In addition, the submission of an intentionally falsified certification will be treated as a reflection on an applicant's basic qualifications to become or to remain a licensee.

* * * * *

5. 47 C.F.R. § 21.20 is amended by revising paragraph (b)(5) to read as follows:

§ 21.20 Defective applications.

* * * * *

(b) * * *

(5) The Multipoint Distribution Service application does not certify the availability of the proposed station site, or the Point-to-Point Microwave Radio, Local Television Transmission, or Digital Electronic Message Service application does not demonstrate the availability of the proposed site of a new facility;

* * * * *

6. 47 C.F.R. § 21.23 is amended by revising paragraphs (a) and (b) to read as follows:

§ 21.23 Amendment of Applications.

(a)(1) Any pending application may be amended as a matter of right if the application has not been designated for hearing, or for comparative evaluation pursuant to § 21.35, or for the random selection process, provided, however, that the amendments must comply with the provisions of § 21.29 as

appropriate and the Commission has not otherwise forbidden the amendment of pending applications.

(2) A Multipoint Distribution Service application tentatively selected for qualification review by the random selection process may be amended as a matter of right up to 14 days after the date of the public notice announcing the tentative selection, provided, however, that the amendments must comply with the provisions of § 21.29 as appropriate and the Commission has not otherwise forbidden the amendment of pending applications.

(3) Provided, however, applications may not be amended if the amendments seek more than a pro forma change of ownership or control (bankruptcy, death or legal disability) of a pending Multipoint Distribution Service application and any amendment or application will be dismissed if the amendment or application seeks more than a pro forma change of ownership or control.

(b) Requests to amend an application designated for hearing or for comparative evaluation or for tentative selection for qualification review by the random selection process may be granted only if a written petition demonstrating good cause is submitted and properly served on the parties of record, except that Multipoint Distribution Service applications tentatively selected in a random selection process may be amended as a matter of right as provided in paragraph (a) of this section. Provided, however, requests to amend applications will not be granted that seek more than a pro forma change of ownership or control (bankruptcy, death or legal disability) of a pending Multipoint Distribution Service application and any application seeking more than a pro forma change of ownership or control will be dismissed.

* * * * *

7. 47 C.F.R. § 21.28 is amended by adding paragraph (f) to read as follows:

§ 21.28 Dismissal and return of applications.

* * * * *

(f) A Multipoint Distribution Service application will be dismissed if the applicant seeks to change ownership or control, except in the case of a pro forma change of ownership or control (bankruptcy, death, or legal disability).

8. 47 C.F.R. § 21.29 is amended by adding paragraph (f) to read as follows:

§ 21.29 Ownership changes and agreements to amend or to dismiss applications or pleadings.

* * * * *

(f) Notwithstanding Section 21.29(e) of this Part, amendments will not be granted that seek more than a pro forma change of ownership or control

(bankruptcy, death, or legal disability) of a pending Multipoint Distribution Service application, and any Multipoint Distribution Service application will be dismissed that seeks more than a pro forma change of ownership or control.

9. 47 C.F.R. **§** 21.31 is amended by revising paragraphs (e)(3) and (4) to read as follows:

§ 21.31 Mutually exclusive applications.

* * * * *

(e) * * * * *

(3) The amendment reflects only a change in ownership or control found by the Commission to be in the public interest, and for which a requested exemption from the "cut-off" requirements of this section is granted, unless the amendment is for more than a pro forma change of ownership or control (bankruptcy, death or legal disability) of a pending Multipoint Distribution Service application in which event the application will be dismissed;

(4) The amendment reflects only a change in ownership or control which results from an agreement under § 21.29 whereby two or more applicants entitled to comparative consideration of their applications join in one (or more) of the existing applications and request dismissal of their other application (or applications) to avoid the delay and cost of comparative consideration, unless the amendment is for one (or more) pending Multipoint Distribution Service application (or applications) in which event the application (or applications) will be dismissed;

* * * * *

10. 47 C.F.R. **§** 21.33 is amended by revising it to read as follows:

§ 21.33 Grants by random selection.

(a) If an application for an authorization in the Digital Electronic Message Service (DEMS) is mutually exclusive with another such application and satisfies the requirements of Section 21.31 of this Part, the applicant may be included in the random selection process set forth in Part 1, Sections 1.821, 1.822 and 1.825.

(b) If an application for an authorization for a Multichannel Multipoint Distribution Service (MMDS) station or for a Multipoint Distribution Service (MDS) H-channel station is mutually exclusive with another such application, and satisfies the requirements of Sections 21.31 and 21.914 of this Part, the applicant may be included in the random selection process set forth in Part 1, Sections 1.821, 1.822 and 1.824.

(c) Renewal applications shall not be included in a random selection process.

(d) If Multipoint Distribution Service applicants enter into

settlements, the applicants in the settlement must be represented by one application only and will not receive the cumulative number of chances in the random selection process that the individual applicants would have had if no settlement had been reached.

11. 47 C.F.R. § 21.39 is amended by redesignating paragraphs (a) and (b) and (c) as paragraphs (b) and (c) and (d) respectively, and by adding a new paragraph (a) to read as follows:

§ 21.39 Considerations involving transfer or assignment applications.

(a) A Multipoint Distribution Service conditional license may not be assigned or transferred prior to the completion of construction of the facility and the timely filing of the certification of completion of construction. However, consent to the assignment or transfer of control of an Multipoint Distribution Service conditional license may be given prior to the completion of construction and the timely filing of the certification of completion of construction where:

(1) The assignment or transfer does not involve a substantial change in ownership or control of the authorized Multipoint Distribution Service facilities; or

(2) The assignment or transfer of control is involuntary due to the licensee's bankruptcy, death, or legal disability.

* * * * *

12. 47 C.F.R. § 21.901(d)(2) is removed and reserved.

13. 47 C.F.R. § 21.901 is amended by removing paragraph (f)(1) and redesignating paragraph (f)(2) as paragraph (f).

14. 47 C.F.R. § 21.902 is amended by revising paragraphs (c)(1) and (c)(2) to read as follows:

§ 21.902 Frequency Interference.

(c) The following interference studies, as appropriate, must be filed initially with each application proposing a new transmitter site:

(1) An analysis of the potential for harmful interference with any authorized or previously-proposed, cochannel and adjacent-channel, station(s):

(i) If the coordinates of the applicant's proposed transmitter are within 100 miles (160.94 km) of the coordinates of any authorized or previously-proposed, cochannel or adjacent-channel, station(s); or

(ii) If the great circle path between the applicant's proposed transmitter and the protected service area of any authorized or previously-proposed, cochannel or adjacent-channel, station(s) is within 150 miles (241.41 km) or less and 90 percent or more of the path is over water, or within 10

miles (16.1 km) of the coast or shoreline of the Atlantic Ocean, the Pacific Ocean, the Gulf of Mexico, any of the Great Lakes, or any bay associated with any of the above (see Secs. 21.701(a), 21.901(a) and 74.902 of this chapter);

(2)(i) One map, folded to an 8 1/2 by 11 inch size, identifying the boundaries of the protected service areas of each authorized or previously-proposed, co-channel station with transmitter site coordinates within 100 miles (160.94 km) of the coordinates of the applicant's proposed transmitter site, and the 45 dB desired signal to undesired signal contour line of the applicant's proposed MDS station for cochannel stations; and

(ii) A second map, folded to an 8 1/2 by 11 inch size, identifying the boundaries of the protected service areas of each authorized or previously-proposed, adjacent-channel station with transmitter site coordinates within 100 miles (160.94 km) of the coordinates of the applicant's proposed transmitter site, and the 0 dB desired signal to undesired signal contour line of the applicant's proposed MDS station for adjacent-channel stations (see 47 C.F.R. § 21.902(d));

* * * * *

15. 47 C.F.R. § 21.913 is amended by removing paragraph (g)(11) and by revising paragraphs (g), (g)(1), (g)(2), (g)(3), (g)(4), (g)(5), (g)(6), (g)(7), (g)(8), (g)(9), (g)(10) to read as follows:

§ 21.913 Signal Booster Stations.

* * * * *

(g) An MDS or ITFS licensee may install and commence operation of a signal booster station that has a maximum power level of -9 dBW EIRP and that does not extend service beyond the boundaries of an MDS station's protected service area or beyond an ITFS licensee's registered receive site, subject to the condition that for sixty (60) days after installation, no objection or petition to deny is filed by an authorized co-channel or adjacent channel ITFS or MDS station with a transmitter within 5 miles (8.05 km) of the coordinates of the primary transmitter of the signal booster. An MDS or ITFS licensee seeking to install a signal booster under this Section must, within 48 hours after installation, submit a certification that:

(1) The maximum power level of the signal booster transmitter does not exceed -9 dBW EIRP;

(2) A description of the signal booster technical specifications (including antenna gain and azimuth), the coordinates of the booster and receivers, and the street address of the signal booster;

(3) No registered receiver of an ITFS E or F channel station, constructed prior to May 26, 1983, is located within a 1 mile (1.61 km) radius of the coordinates of the booster, or in the alternative, that a consent statement has been obtained from the affected ITFS licensee;

(4) No environmental assessment location as defined at § 1.1307 of this chapter is affected by installation and/or operation of the signal booster;

(5) Each MDS and/or ITFS station licensee with protected service areas or registered receivers within a 5 mile (8.05 km) radius of the coordinates of the booster has been given notice of its installation;

(6) Consent has been obtained from each MDS or ITFS station licensee whose signal is repeated by the signal booster;

(7) The signal booster site is within the protected service area of the MDS station, if the signal of an MDS station is repeated;

(8) The power flux density at the edge of the MDS station's protected service area does not exceed -75.6 dBW/m^2, if the signal of an MDS station is repeated;

(9) The antenna structure will extend less than 6.10 meters (20 feet) above the ground or natural formation or less than 6.10 meters (20 feet) above an existing manmade structure (other than an antenna structure); and

(10) The MDS or ITFS licensee understands and agrees that in the event harmful interference is claimed by the filing of an objection or petition to deny, the licensee must terminate operation within two (2) hours of written notification by the Commission, and must not recommence operation until receipt of written authorization to do so by the Commission.

16. 47 C.F.R. § 21.915 is added to read as follows:

§ 21.915 One-to-a-market requirement.

Each applicant may file only a single Multipoint Distribution Service application for the same channel or channel group in each area. The stockholders, partners, owners, trustees, beneficiaries, officers, directors, or any other person or entity holding, directly or indirectly, any interest in one applicant or application for an area and channel or channel group, must not have any interest, directly or indirectly, in another applicant or application for that same area and channel or channel group.

PART 74 -- EXPERIMENTAL, AUXILIARY, AND SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

17. The authority citation for 47 C.F.R. Part 74 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. §§ 154, 303, unless otherwise noted.

18. 47 C.F.R. § 74.985 is amended by removing paragraph (g)(11) and by revising paragraphs (g), (g)(1), (g)(2), (g)(3), (g)(4), (g)(5), (g)(6), (g)(7), (g)(8), (g)(9), (g)(10) to read as follows:

§ 74.985 Signal Booster Stations.

* * * * *

(g) An MDS or ITFS licensee may install and commence operation of a signal booster station that has a maximum power level of -9 dBW EIRP and that does not extend service beyond the boundaries of an MDS station's protected service area or beyond an ITFS licensee's registered receive site, subject to the condition that for sixty (60) days after installation, no objection or petition to deny is filed by an authorized co-channel or adjacent channel ITFS or MDS station with a transmitter within 5 miles (8.05 km) of the coordinates of the primary transmitter of the signal booster. An MDS or ITFS licensee seeking to install a signal booster under this rule must, within 48 hours after installation, submit a certification that:

(1) The maximum power level of the signal booster transmitter does not exceed -9 dBW EIRP;

(2) A description of the signal booster technical specifications (including antenna gain and azimuth), the coordinates of the booster and receivers, and the street address of the signal booster;

(3) No registered receiver of an ITFS E or F channel station, constructed prior to May 26, 1983, is located within a 1 mile (1.61 km) radius of the coordinates of the booster, or in the alternative, that a consent statement has been obtained from the affected ITFS licensee;

(4) No environmental assessment location as defined at § 1.1307 of this chapter is affected by installation and/or operation of the signal booster;

(5) Each MDS and/or ITFS station licensee with protected service areas or registered receivers within a 5 mile (8.05 km) radius of the coordinates of the booster has been given notice of its installation;

(6) Consent has been obtained from each MDS or ITFS station licensee whose signal is repeated by the signal booster;

(7) The signal booster site is within the protected service area of the MDS station, if the signal of an MDS station is repeated;

(8) The power flux density at the edge of the MDS station's protected service area does not exceed -75.6 dBW/m2, if the signal of an MDS station is repeated;

(9) The antenna structure will extend less than 6.10 meters (20 feet) above the ground or natural formation or less than 6.10 meters (20 feet) above an existing manmade structure (other than an antenna structure); and

(10) The MDS or ITFS licensee understands and agrees that in the event harmful interference is claimed by the filing of an objection or petition to deny, the licensee must terminate operation within two (2) hours of written notification by the Commission, and must not recommence operation until

receipt of written authorization to do so by the Commission.